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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 98

THE UNITED STATES OF AMERICA, APPELLANT

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, SAMUEL J. ABELOW, AND ROBERT R. BARR, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court filed an opinion sustaining a demurrer to the indictment on March 25, 1936 (R. 11). After reargument the court filed a supplemental opinion on April 6, 1936 (R. 23). These opinions are reported in 14 F. Supp. 230.

JURISDICTION

The judgment of the District Court was entered on April 20, 1936 (R. 26). The appeal was prayed and allowed on May 5, 1936 (R. 27, 29).

The jurisdiction to review the judgment complained of, by direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682).

Probable jurisdiction was noted by this Court on October 12, 1936.

QUESTION PRESENTED

Whether the District Court erred in sustaining a demurrer to the first count of the indictment which charges a conspiracy to violate the Joint Resolution of the Congress of the United States entitled "Joint Resolution To prohibit the sale of arms and munitions of war in the United States under certain conditions", approved May 28, 1934 (48 Stat. 811), and the Presidential Proclamation issued thereunder on May 28, 1934 (48 Stat. 1744–45), on the ground that the Joint Resolution constitutes an improper delegation of legislative power to the President.

STATUTE INVOLVED

The Joint Resolution of May 28, 1934 (c. 365, 48 Stat. 811), is as follows:

JOINT RESOLUTION

To prohibit the sale of arms or munitions of war in the United States under certain conditions

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the

President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

SEC. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both.

Approved, May 28, 1934.

The two proclamations issued under this Resolution are set forth in the Appendix, *infra,* pp. 27–31.

STATEMENT

On January 27, 1936, the defendants were indicted in the United States District Court for the Southern District of New York (R. 3). The

indictment is in two separate counts. The first count, which is the only one here involved, charges that the defendants conspired to sell in the United States fifteen machine guns to Bolivia, one of the countries engaged in armed conflict in the Chaco, in violation of the Joint Resolution and the Presidential Proclamation of May 28, 1934 (R. 3).

The defendants demurred to this first count (R. 6–9). The District Court, by a judgment dated April 18, 1936, and entered April 20, 1936 (R. 20), sustained the demurrer. The judgment of the court was based upon the ground that the Joint Resolution constituted an improper delegation of legislative power to the President. The court also considered whether the executive, in issuing his proclamation, had met the requirements laid upon him by the terms of the Joint Resolution, and also whether prosecution for the alleged offenses could properly be instituted after the effective date of the second proclamation, dated November 14, 1935 (*infra*, p. 28), revoking the first. Both of these questions were resolved against the defendants.

SPECIFICATIONS OF ERRORS TO BE URGED

1. The District Court committed material error against plaintiff in sustaining the demurrers of the defendants Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., Barr Shipping Corporation, John S. Allard, Clarence W. Webster, Samuel J. Abelow, and Robert R. Barr, to the first count of the indictment.

2. The District Court committed material error against appellant in sustaining said demurrers in holding that the Joint Resolution of May 28, 1934 (48 Stat. 811), was invalid.

3. The District Court committed material error against appellant in sustaining said demurrers in holding that the Presidential Proclamation of May 28, 1934 (48 Stat. 1744–45), made pursuant to the said Joint Resolution of May 28, 1934, was invalid.

4. The District Court committed material error against appellant in sustaining said demurrers in holding that the Joint Resolution of May 28, 1934, did not accomplish a valid delegation of legislative power to the President of the United States.

5. The District Court committed material error against appellant in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934, was an unconstitutional delegation by Congress of legislative power to the President of the United States.

6. The District Court committed material error against appellant in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934, embodied such an attempted abdication of legislative responsibility as to deprive it of constitutional validity.

7. The District Court committed material error against appellant in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934, was unconstitutional.

101014—36——2

SUMMARY OF ARGUMENT

The Joint Resolution of May 28, 1934, does not constitute an unconstitutional delegation of legislative power to the President. From the beginning of the government similar delegations of power have been made in the field of foreign relations. Moreover, it meets the requirements for a proper delegation which has been laid down in the most recent cases. The policy of Congress is clearly stated, the standards are simple and definite, and a finding by the President is required. Clearly the present case is controlled by the decisions in *Hampton & Co.* v. *United States,* 276 U. S. 394, and *Field* v. *Clark,* 143 U. S. 649, both of which were likewise concerned with the conduct of foreign relations. There is no merit in the defendant's claim that the President is required to make simply an estimate of the future efficacy of the law. The argument rests upon a misconstruction of the Resolution, and, in any event, it is inconsistent with many decisions of this Court.

II

The two other grounds urged below by defendants in support of the demurrer, and overruled by the District Court, are not properly before this Court under the Criminal Appeals Act. In any event, they are without merit. By his proclamation the President clearly complied with every requirement of the Joint Resolution, making all findings of fact necessary. Nor did the proclamation

of November 14, 1935, revoking the former proclamation, terminate liability for offenses committed prior to the revocation. The prosecution is authorized by the Resolution, which has not been repealed. Moreover, even if the proclamation can be considered as a repeal of the Resolution, the prosecution is authorized by R. S. Section 13.

ARGUMENT

I

THE JOINT RESOLUTION OF MAY 28, 1934, DOES NOT CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO THE PRESIDENT

A. HISTORICAL REVIEW OF CONGRESSIONAL RESOLUTION ON FOREIGN RELATIONS

From the beginning of the government, in the conduct of our foreign relations, Congress has followed the practice of conferring upon the President power similar to that conferred by the present Resolution. As early as March 26, 1794, embargoes were laid upon vessels in ports of the United States bound for foreign ports. 1 Stat. 400. See also Act of April 18, 1794, 1 Stat. 401. In that same year Congress first adopted the device of imposing upon the President the duty of determining when conditions had arisen requiring that an embargo should be applied. By the Act of June 4, 1794 (c. 41, 1 Stat. 372), authority was delegated to the President to lay an embargo, enforced by appropriate regulations, upon all ships in the ports of the

United States whenever, in his opinion, "the public safety shall so require". This precedent, it is to be noted, was adopted while many members of the Constitutional Convention sat in Congress.[1] That during the ensuing one hundred and forty years Congress has consistently entrusted the President with similar powers in a field "cognate to the conduct by him of the foreign relations of the Government",[2] is convincing evidence that the practice and acquiescence under it for so long a time reflect a valid exercise of legislative authority. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472–473; *Field* v. *Clark*, 143 U. S. 649, 691.

While the Joint Resolution here in question is a direct outgrowth of the early embargo Acts, it is also substantially identical with a series of more recent Congressional enactments which have occupied an important place in our foreign policy. The Joint Resolution of March 14, 1912 (37 Stat. 630), provided for embargoes, with such exceptions as the President should prescribe, upon the exportation of arms or ammunition "whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by

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[1] It has frequently been pointed out that a contemporaneous legislative exposition of the Constitution, when its framers were actively participating in public affairs, is of great weight in determining its proper construction. *Myers* v. *United States*, 272 U. S. 52, 175; *Williams* v. *United States*, 289 U. S. 553, 573–574; *Knowlton* v. *Moore*, 178 U. S. 41, 56.

[2] See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422–425. where the statutory references and citations to pertinent Presidential proclamations are collected.

the use of arms or munitions of war procured from the United States."[3] By an amendment of 1922 (Joint Resolution of January 31, 1922; 42 Stat. 361) the resolution was amended to include, in addition, "any country in which the United States exercises extraterritorial jurisdiction", and the President's authority was broadened by authorizing him to include cases where conditions of domestic violence "are or may be" promoted by the use of munitions procured from the United States. As so amended, it is still in effect (U. S. C., Title 22, Secs. 236–237). Under its provisions proclamations have been issued prohibiting shipments of arms to Mexico (March 14, 1912, 37 Stat. 1733; October 19, 1915, 39 Stat. 1756; July 12, 1919, 41 Stat. 1762; and January 7, 1924, 43 Stat. 1934); to China (March 4, 1922, 42 Stat. 2264); to Honduras (March 22, 1924, 43 Stat. 1942; see also proclamation of May 15, 1924, 43 Stat. 1950); to Cuba (May 2, 1924, 43 Stat. 1946; June 29, 1934, 49 Stat. Proc. 1); to Nicaragua (September 15, 1926, 44 Stat. 2625); and to Brazil (October 22, 1930, 46 Stat. 3036).

[3] This resolution was an amendment of the Joint Resolution of April 22, 1898 (30 Stat. 739), which, probably as a conservation measure, authorized the President, "in his discretion, * * * to prohibit the export of coal or other material used in war * * *." A proclamation of October 14, 1905 (34 Stat. 3183), under this resolution, prohibited exportation of war material to Porto Rico and the Dominican Republic.

B. THE JOINT RESOLUTION IS CLEARLY SUSTAINED BY THE DECISION OF THIS COURT

An analysis of the Joint Resolution of May 28, 1934 (*supra*, pp. 2–3) shows that the power which it delegates to the President is less than that which has been approved in many previous decisions of this Court.

The Resolution (48 Stat. 811) prohibits (except under exceptions to be prescribed by the President, as to which no question has been raised), the sale of arms or munitions of war in the United States to those countries in conflict in the Chaco, if the President finds that such prohibition "may contribute to the reestablishment of peace between those countries", "and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect." The Resolution meets every test which this Court has established as requisites to a proper delegation of power. The Congressional policy is clearly declared, the standard is adequately defined, and a finding by the President is required in the exercise of his authority to enact the prohibition. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415; *Schechter Corp.* v. *United States*, 295 U. S. 495, 530.

Congress has clearly stated its policy; it wished to give the aid of the United States in reestablishing peace between the belligerents in the Chaco.

Congress has set up a definite standard upon which the President is to base his action: he must find that the prohibition of the sale of arms and munitions of war in the United States to the Chaco combatants may contribute to the reestablishment of peace between those countries.

The fact to be found by the President—whether prohibition of the sale of arms in this country may contribute to the reestablishment of peace in the Chaco—is not, as defendants have contended, a vague matter of opinion merely, upon which only a guess might be made. On the contrary, it is an eminently practical question depending upon facts which were peculiarly available to the President. Cf. *United States* v. *Chemical Foundation,* 272 U. S. 1, 12. The state of the war, which might vary widely and rapidly, the number and type of purchases in this country by each side, and the sales if no prohibition were imposed, which would depend upon the financial condition of the belligerents, transportation facilities, and the like, were all factors which of necessity entered into his decision. Perhaps even more important was the fact of cooperation, which Congress had specifically required him to consider. This cooperation of other countries would be not only in similarly prohibiting sales to the combatants, but also is making effective the prohibition in this country by taking measures to insure that sales would not be

made to their citizens of arms ultimately destined for Bolivia and Paraguay.[4]

These subsidiary questions of fact, as well as many others which might be mentioned, could not, in practice, adequately have been made by Congress. Cf. *Hampton & Co.* v. *United States,* 276 U. S. 394. The Resolution, therefore, appropriately committed to the executive, in connection with the determination of the ultimate fact of the effect of the prohibition of sales of arms, the task of properly evaluating the constantly changing situation of the belligerents and the complex and varying attitudes of other nations as revealed by continuous diplomatic correspondence. Cf. *United States* v. *Chemical Foundation, supra,* at p. 12; *Douglas* v. *Noble,* 261 U. S. 165, 169; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 27.

In any event, the discretion is much less broad than that allowed the executive by other statutes which have been sustained by this Court. Section 3 of the Act of October 1, 1890 (26 Stat. 567, 612) provided that "whenever, and so often as the

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[4] The decision by the President as to the fact of this cooperation may be attacked by appellees as a further delegation of power. Assuming, *arguendo*, that the Resolution may be so construed, it is perfectly clear that this fact, which could be ascertained by Congress only with the greatest difficulty, and which may change rapidly from time to time, may properly be left to the determination of the President. See pp. ——, *infra*.

President shall be satisfied" that any country imposes duties on certain products which "he may deem to be reciprocally unequal and unreasonable", he might so proclaim and thereby suspend the operation of certain sections of the Tariff Act. The test there stated—"reciprocally unequal and unreasonable"—is obviously not susceptible of precise determination; much was left to the judgment of the executive. This Court, in *Field* v. *Clark,* 143 U. S. 649, held the delegation proper.

An even more striking illustration is contained in Section 315 of Title III of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 941). That section provides that whenever the President finds, with respect to articles produced both here and in other countries, "that the duties fixed in this Act do not equalize the * * * differences in costs of production in the United States and the principal competing country", he shall determine the differences and equalize them by changing the tariff classifications, provided that the change in rates is not more than 50 per cent. Determination of foreign and domestic costs of production is difficult in the extreme. Estimates enter largely into the calculations—estimates of the value of materials, some of which have no current market price, estimates of the amount of plant and other capital equipment consumed in the process of producing a unit of goods, estimates of the amount of labor and capital to be allocated

to each of several joint products, and the like.[5] In *Hampton & Co.* v. *United States,* 276 U. S. 394, the delegation was sustained. We submit that the present Resolution is clearly within the standards laid down in those cases. See also *Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266; *New York Central Securities Co.* v. *United States,* 287 U. S. 12; *Tagg Bros.* v. *United States,* 280 U. S. 420; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Mahler* v. *Eby,* 264 U. S. 32; *Avent* v. *United States,* 266 U. S. 127; *Mutual Film Corp.* v. *Ohio Industrial Commission,* 236 U. S. 230; *United States* v. *Grimaud,* 220 U. S. 506; *Union Bridge Co.* v. *United States,* 204 U. S. 364. That it is a criminal statute which is brought into effect by the proclamation is, of course, no ground for objection. *United States* v. *Grimaud, supra.*

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[5] A special committee of the Senate has recently found that "costs are in the last analysis matters of opinion and are not susceptible of scientific determination." Report of Special Committee of the Senate on Investigation of the Munition Industry, S. Rep. No. 944, Part 2, 74th Cong., 1st Sess., p. 6. See especially pp. 19–24 (as to difficulties of valuation), pp. 27–36 (as to valuation difficulties in determining depreciation and similar cost items), and pp. 85–91. See also Testimony of Robert L. O'Brien, Chairman of the United States Tariff Commission, before the House Ways and Means Committee, Hearings on H. R. 8430, 73d Congress, 2d Session, pp. 72–76; John Day Larkin, *The President's Control of the Tariff* (1936), pp. 18–29, 67–78; W. H. Wynne, *A Tariff Commission at Work*, Journal of Canadian Bankers' Association, Vol. 33 (January and July, 1926), pp. 184, 195–197, 421, 423; T. W. Page, *Making the Tariff in the United States*, pp. 83–99.

One further factor adds to the present significance of *Field* v. *Clark* and the *Hampton* case. The tariff Acts there involved, like the resolution here, were inseparably related to the external relations of the United States. See also *The Aurora*, 7 Cranch 382. The Court has recently recognized, in reviewing the history of embargo legislation, that the delegation of the powers confided by such statutes to the President reflected a recognition that it was necessary to grant to the Executive "an authority which was cognate to the conduct by him of the foreign relations of the government." See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422.

Even more direct authority is supplied by *United States* v. *Chavez*, 228 U. S. 525, and *United States* v. *Mesa*, 228 U. S. 533, in which indictments based upon the Resolution of March 14, 1912 [6] (see p. 7, *supra*), were sustained. It is true that the constitutional question was not raised in those cases, but it is implicit in the decisions that the Resolution was constitutional. This conclusion is reinforced by the fact that in a later case, in which the Circuit Court of Appeals had specifically upheld the constitutionality of the Resolu-

[6] There is no essential difference between the facts to be found by the President under the Resolution of March 14, 1912, and under the Resolution in this case. In the former the President was given power to find that a condition of violence was promoted by the use of arms procured in this country. In the latter he is given power to find the reciprocal fact, that the prevention of the sale of arms has power to reestablish peace.

tion, a petition for certiorari was denied by this Court. *Talbott* v. *United States,* 208 Fed. 144 (C. C. A. 5th), certiorari denied, 232 U. S. 722. See also *United States* v. *Lucas,* 6 F. (2d) 327 (W. D. Wash.).

We submit, therefore, that the present Resolution complies in every respect with the requirements of *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 495. Moreover, an analysis of those cases reveals that they provide no support for defendants' contention. In the *Panama* case, *supra,* Section 9 (c) of the National Industrial Recovery Act was held unconstitutional because it delegated to the President a completely unfettered discretion. The section stated merely that "The President is authorized to prohibit" the interstate or foreign shipment of oil produced in excess of state law or regulation. As the Court stated (p. 430):

> * * * Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

We have pointed out above that the Resolution here involved clearly indicates the policy which Congress desires to pursue, and sets up the standards which are to guide the action of the President.

A similar comment may be made with respect to the *Schechter* case, *supra.* Again the Court could

find no adequate standards by which the executive was to be guided, stating (pp. 541–542):

> Section 3 of the Recovery Act * * * supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. * * * the discretion of the President * * * is virtually unfettered.

C. THERE IS NO MERIT IN THE CLAIM THAT THE RESOLUTION INVALIDLY DELEGATES THE POWER TO DETERMINE FUTURE EFFICACY RATHER THAN PRESENT FACT

Defendants urge that insofar as the Resolution requires the President to find that an embargo "may contribute to the reestablishment of peace", he is allowed to make simply an estimate as to the future efficacy of the law, rather than a finding of present facts. The word "finding", they urge, cannot properly be applied to such a determination. The objection is equally applicable to the Joint Resolution of January 31, 1922 (on pp. 7–8), under which the shipment of arms is prohibited when the President finds that conditions "may" be promoted by the use of such arms and so makes proclamation. Two answers may, however, be made to the contention.

First, the argument rests upon a misinterpretation of the Resolution. It does not require, in any sense, the determination of what will be the facts

in the future. The President must find a fact presently existing at the time of proclamation, to wit, will the prohibition of the sale of arms *now* contribute to the reestablishment of peace in the Chaco *now*. The words "may contribute", upon which appellees and the lower court so strongly rely, are perfectly consistent with this interpretation. "Contribute" alone, may obviously refer to the present time, and "may" in the context of the Resolution, denotes simply present power or ability or potentiality of the prohibition of the sale of arms to contribute to the reestablishment of peace. See *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 411.

Moreover, any element of present determination of future effect which may be present in the function of the President is clearly not fatal to the validity of the Resolution, for it is not at all unusual. Rate-making bodies, for example, must determine not only value, which is largely dependent on future factors such as depreciation, obsolescence and continuation of the utility as a going concern, but must also estimate the future revenue which will result in order to determine whether the rates are confiscatory. Such delegations of power are, however, commonly upheld. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Reagan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362. Whether continuation of or change in the present situation is most apt to be "in the public interest"

in the future has been held a proper basis for the exercise of delegated authority (see *New York Central Securities Co.* v. *United States*, 287 U. S. 12; *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266); and likewise what regulations are presently necessary for the future protection of the public domain. *United States* v. *Grimaud*, 220 U. S. 506. The decisions of this Court clearly establish that the proper test, and the only test, of the validity of authority vested by Congress in the executive is the absence of a free and arbitrary discretion. *Schechter Corp.* v. *United States*, 295 U. S. 495, 538; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 420; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386–387; *Field* v. *Clark*, 143 U. S. 649, 692–693. We submit, therefore, that assignment to the President of the duty of determining whether the prohibition of the sale of arms has the power to contribute to the reestablishment of peace between the Chaco belligerents is not an invalid delegation but rather a proper assignment, to the department best fitted to determine it, if an ordinary question of present fact.

II

THE OTHER GROUNDS URGED BELOW IN SUPPORT OF THE DEMURRER ARE WITHOUT MERIT

In the District Court defendants advanced two further contentions in support of their demurrer to the first count of the indictment. They urged, first, that the President, in issuing his proclama-

tion, did not meet the requirements imposed upon him by the Resolution, and that consequently the proclamation did not bring the statute into effect. Secondly, they contended that the indictment does not lie because it was found on January 27, 1936, subsequent to the date upon which the President proclaimed the revocation of his first proclamation. Each of these grounds was held to be without merit by the court below, and in this conclusion we believe the decision of the lower court was clearly correct. Should the defendants attempt to obtain a review on this appeal of the decision below insofar as it relates to the unsustained grounds of demurrer, it is the position of the Government that this Court is without jurisdiction, under the Criminal Appeals Act.

A. QUESTIONS DECIDED AGAINST THE DEFENDANTS ARE NOT WITHIN THE JURISDICTION CONFERRED BY THE CRIMINAL APPEALS ACT.

The Criminal Appeals Act of March 2, 1907, *infra*, p. 30, provides for appeal "by and on behalf of the United States" from decisions holding an indictment bad, or arresting a judgment of conviction, because of the invalidity or construction of the statute upon which the indictment is founded, and also from decisions "sustaining a special plea in bar" when the defendant has not been placed in jeopardy.

Prior to the enactment of the Criminal Appeals Act, the Government had no opportunity to obtain

review of questions of law which were decided against it in the court of first instance. *United States* v. *Sanges,* 144 U. S. 310. The purpose of the Act was to remedy this situation, which often resulted in the inability to enforce a valid statute. The Act did not represent the judgment of Congress that the decisions specified were of such importance that immediate review by the Supreme Court was desirable, irrespective of which party obtained the decision below. Its sole purpose was to make appellate review possible "when the United States had been deprived of a remedy against wrongdoers." See House Rep. No. 2119, 59th Cong., 1st Sess.[7] See *United States* v. *Bitty,* 208 U. S. 393, 400; *United States* v. *Stevenson,* 215 U. S. 190, 195–196. Accordingly, the jurisdiction of this Court is limited to an appeal "taken by and on behalf of the United States." See *United States* v. *Bitty, supra,* 399–400; *United States* v. *Heinze,* 218 U. S. 532, 545–546. It seems plain that the jurisdiction of this Court does not extend to questions decided in favor of the United States, which may be reviewed in the normal manner after conviction.

The Act confers a special and limited jurisdiction, and the Court may not examine the whole case when a question has been appealed under this Act. *United States* v. *Keitel,* 211 U. S. 370, 398–399;

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[7] The other reports are silent as to the purpose of the enactment. Sen. Rep. No. 3922, 59th Cong., 1st Sess.; House Rep. No. 8113, 59th Cong., 2d Sess.

United States v. *Mason*, 213 U. S. 115, 122; *United States* v. *Mescall*, 215 U. S. 26, 31; *United States* v. *Kissel*, 218 U. S. 601, 606. It follows that the general rule, that any ground may be urged in support of the judgment below, *Langnes* v. *Green*, 282 U. S. 531, 537–538, is inapplicable to cases arising under this Act.

B. THE PROCLAMATION OF MAY 28, 1934, IS IN CONFORMITY WITH THE REQUIREMENTS OF THE JOINT RESOLUTION

Defendants urged below that the Proclamation of May 28, 1934, was not in conformity with the Joint Resolution for two reasons: (1) the language of the Proclamation does not follow the language of the Resolution, and (2) the Proclamation does not make a detailed statement of the findings upon which it is based, and that such findings as are stated could not, in fact, have been made.

The first contention is demonstrably without merit. The Proclamation declares that the President has "found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries." It also declares that the President has consulted with the governments of other American republics and has been assured of such cooperation as he has deemed necessary as contemplated by the Resolution. Certainly this is complete compliance with every re-

quirement for proclamation which the Resolution specifies.

Defendants' second point is also unsound. The President was not required to make lengthy and detailed findings of fact, stating the processes by which he had arrived at his conclusion. Unless the statute requires that further facts be found and stated by the executive officer (cf. *Mahler* v. *Eby*, 264 U. S. 32) the specific statement by the President, in the language of the statute, that he has found the facts which are prerequisite to his action, is sufficient. *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163; *Philadelphia & Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448, 458; *Martin* v. *Mott*, 12 Wheat. 19, 31. The recent statement of the Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431–432, is not to the contrary. There the Act required no findings, and the question was whether, if it were to be construed as requiring the existence of certain circumstances and conditions upon the basis of which the President was to act, a statement by him of the existence of these facts was necessary. Here the President stated that he had found the facts upon which, under the Resolution, his action was to be based. Moreover, findings are of less importance in regulations which constitute general legislation than in administrative orders in the nature of judgments against particular individuals. See *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186.

In addition, it may be pointed out that defendants base their objection upon an erroneous interpretation of the facts. Their contention is that because the Resolution and the proclamation bear the same date, the President could not, in fact, have made the finding and consulted with other governments as the Resolution required. Actually, the President had, for some time prior to May 28, 1934, been in contact with other governments on this question and was no doubt well acquainted with the situation.[8] The Resolution certainly does not require that all the consultations be made anew after its passage. The information in the possession of the President at the time the Resolution was passed enabled him to put it into effect without delay.

C. THE PROCLAMATION OF NOVEMBER 14, 1935, REVOKING THE PROCLAMATION OF MAY 28, 1934, DID NOT TERMINATE LIABILITY FOR OFFENSES COMMITTED PRIOR TO SUCH REVOCATION

Defendants urged below that the revocation of the Proclamation of May 28, 1934, by the Proclamation of November 14, 1935 (*infra*, pp. 28–30) effectively terminated all liability for acts done while the first proclamation was in effect. The argument rests upon the rule that in the absence of a competent saving clause, no proceedings can be

[8] See Senate Rept. No. 1153, 73d Congress, 2d Session, p. 2; *The Chaco Arms Embargo*, Report by the American Committee in Geneva to the Special Senate Committee Investigating the Munitions Industry, 74th Congress, 2d Session, pp. 7–8.

had under a statute which has been repealed or has otherwise expired. *United States* v. *Chambers*, 291 U. S. 217; *United States* v. *Tynen*, 11 Wall. 88; *Yeaton* v. *United States*, 5 Cranch 281. The general saving clause contained in Section 13 of the Revised Statutes (U. S. C., Title 1, Sec. 29) is said to be inapplicable.

The rule may be freely admitted, but it is wholly inapposite here. It is based upon the principle that one can not be punished when authority to inflict that punishment no longer exists: *The Irresistible*, 7 Wheat. 551; *United States* v. *Chambers*, *supra*, pp. 222–223. Here the revocation of the original proclamation did not end authority to inflict punishment for prior violations of the statute. Revocation of the proclamation on November 14, 1935, removed one of the prerequisites essential to liability for similar acts in the future, so that it was no longer unlawful to make such sales, but the revocation obviously did not repeal the Resolution. The Act of Congress still remains in full force, and by Section 2 authorizes and prescribes the punishment for any violations of it which may have been committed. If defendants are found to have done acts illegal under Section 1, they may still be punished under the authority of Section 2.

Appellees may urge that the statute expired when the Proclamation of May 28, 1934, was revoked by the Proclamation of November 14, 1935. We believe that the above analysis clearly reveals that the statute did not expire, but in any event the

point is without merit. By R. S. Section 13 Congress has provided a general saving clause designed to avoid further difficulties such as those which arose in *United States* v. *Tynen* and *Yeaton* v. *United States, supra.* That section constitutes ample authority for the present prosecution. *Great Northern Ry Co.* v. *United States,* 208 U. S. 452. It is unnecessary to discuss whether any force should be ascribed to the saving clause in the revoking Proclamation of November 14, 1935.

CONCLUSION

Wherefore, it is submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to overrule the demurrer.

Respectfully submitted.

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OCTOBER 1936.

APPENDIX

The Presidential Proclamation of May 28, 1934 (48 Stat. 1744–1745), is as follows:

SALE OF ARMS AND MUNITIONS OF WAR TO BOLIVIA AND PARAGUAY

By the President of the United States of America

A PROCLAMATION

WHEREAS section 1 of a joint resolution of Congress entitled "Joint Resolution To prohibit the sale of arms or munitions of war in the United States under certain conditions", approved May 28, 1934, provides as follows:

"That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or

to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress."

AND WHEREAS it is provided by section 2 of the said joint resolution that—

"Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both."

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial

and punishment any offenders against the same.

And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this twenty-eighth day of May, in the year of our Lord nineteen hundred and thirty-four, and of the Independence of the United States of America the one hundred and fifty-eighth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,

Secretary of State.

The Presidential Proclamation of November 14, 1935, No. 2147, is as follows:

SALE OF ARMS AND MUNITIONS TO BOLIVIA AND PARAGUAY

By the President of the United States of America

A PROCLAMATION

WHEREAS by a Proclamation of the President issued on May 28, 1934, pursuant to a Joint Resolution of Congress approved by the President on the same date, it was declared that the prohibition of the sale of arms and munitions of war in the United States to those countries then engaged in armed conflict in the Chaco might contribute

to the reestablishment of peace between those countries; and

WHEREAS by virtue of the Joint Resolution and the Proclamation above mentioned it became unlawful to sell arms or munitions of war to Bolivia or Paraguay; and

WHEREAS the Peace Conference in Plenary Session in Buenos Aires formally adopted on October 28, 1935, a Resolution declaring that the war between Bolivia and Paraguay had come to an end; * * *

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to Bolivia or Paraguay will no longer be necessary as a contribution to the reestablishment of peace between those countries, and the above-mentioned Proclamation of May 28, 1934, is hereby revoked as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935, provided, however, that this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the aforesaid Proclamation of May 28, 1934, or the Joint Resolution of Congress approved by the President on the same date; and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 14th day of November, in the year of our Lord nineteen hundred and thirty-five, and of the

Independence of the United States of America the one hundred and sixtieth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:
CORDELL HULL,
Secretary of State.

Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended; U. S. C., Title 18, Sec. 682:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

U. S. GOVERNMENT PRINTING OFFICE: 1936